STATE OF MICHIGAN

COURT OF APPEALS

CHESTER GEER,

Plaintiff-Appellee/Cross-Appellant,

and

JUDY GEER

Plaintiff,

v

NIKOLIC INDUSTRIES, INC.,

Defendant-Appellant/Counter-Defendant/Cross-Appellee,

and

DOMESTIC UNIFORM RENTAL,

Defendant/Counter-Plaintiff.

UNPUBLISHED
May 9, 2006

No. 256572
Macomb Circuit Court
LC No. 01-003195-NO

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this premises liability action, defendant Nikolic Industries, Inc. appeals as of right from a judgment in favor of plaintiff, Chester Geer,[1] following a jury trial. Plaintiff cross-appeals. We affirm.

[1] Because Judy Geer's claims are derivative to her husband, "plaintiff" refers to Chester Geer.

I

Plaintiff went to defendant Nikolic Industries, Inc.'s place of business to seek employment and after requesting and receiving an application, he fell or slipped on a mat provided by non-party Domestic Uniform Rental (Domestic). Plaintiff brought this negligence and premises liability action against defendant.[2] Relying on plaintiff's concession that he entered the premises on his own volition, defendant argued in its motion for summary disposition under MCR 2.116(C)(10) that plaintiff was a trespasser absent any evidence demonstrating defendant's consent either express or implied for plaintiff to be on the property. Defendant further argued plaintiff's failure to allege that it engaged in willful and wanton misconduct or active negligence warranted dismissal of plaintiff's claims. In response, plaintiff argued alternative theories that he was either an invitee or licensee. Plaintiff filed an opposing motion for summary disposition under MCR 2.116(C)(9), arguing that there were no fact issues pertaining to defendant's failure to inspect and warn of the known danger whether he was considered a licensee or invitee. Plaintiff submitted evidence demonstrating that defendant accepted walk-in applications, routinely allowed applicants to remain on the premises to complete the applications, in addition to evidence that defendant knew of recurring problems with wet floor mats on Domestic's delivery days but failed to warn of the hidden danger.

While the parties' cross-motions for summary disposition were pending, defendant filed a motion to file a notice of non-party fault as to Domestic, and plaintiff filed a motion for summary disposition under MCR 2.116(C)(9) with respect to defendant's anticipated defense of non-party Domestic's fault.

The trial court denied defendant's motion for summary disposition. The trial court first determined that as a matter of law, plaintiff was not a trespasser on the basis of evidence that defendant, either expressly or impliedly, consented to having strangers enter its premises to complete applications and drop off resumes. The trial court also determined as a matter of law that plaintiff was not an invitee. The trial court concluded that, although defendant was in business to make a profit, defendant did not meet the definition of "commercial business," as defined in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 604; 614 NW2d 88 (2000), to warrant imposition of a higher duty of care standard toward plaintiff. Finally, the trial court also determined that plaintiff was properly classified as a licensee, and that issues of material fact remained as to the proximate cause of plaintiff's injury. Accordingly, the trial court also denied plaintiff's motion for summary disposition.[3]

The parties filed cross-motions for reconsideration. The trial court denied defendant's motion for reconsideration and granted in part plaintiff's motion for reconsideration, concluding that there were issues of fact remaining as to plaintiff's status as either an invitee or a licensee

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[2] "Defendant", in this case refers to Nikolic Industries, Inc. Plaintiff and Domestic reached a settlement agreement and plaintiff's claims against Domestic were voluntarily dismissed.

[3] Although plaintiff filed his motion under MCR 2.116(C)(9), the trial court determined it was more appropriately submitted under MCR 2.116(C)(10).

which should be determined by the factfinder. Defendant's subsequent motion for reconsideration was denied. The trial court also denied plaintiff's second motion for summary disposition regarding defendant's anticipated defense of non-party Domestic's fault and the matter proceeded to trial. The jury returned with a verdict allocating fault equally between defendant and Domestic, and the trial court entered a judgment for 50% of the verdict for the total amount of $232,500. The trial court denied defendant's motion for JNOV and/or a new trial.[4] Following entry of an order staying the proceedings, defendant now appeals. Plaintiff also cross-appeals the trial court's order denying plaintiff's motion to preclude defendant from asserting the alleged fault of non-party Domestic as a defense.

II

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id*.

"The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law. In other words, the court determines the circumstances that must exist in order for a defendant's duty to arise . . . ." *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW 2d 773 (2001) (citation omitted). Generally, when a determination of duty depends upon factual findings, then the question of status is one for the jury. *Stitt, supra* at 595; *Pippin v Attallah*, 245 Mich App 136, 141; 626 NW2d 911 (2001).

For alleged instructional errors that have been properly preserved this Court abides by the following standards of review:

> [Appellate courts] review claims of instructional error de novo. Jury instructions should not omit material issues, defenses, or theories that are supported by the evidence. Instructional error warrants reversal if it 'resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be "inconsistent with substantial justice."' [*Ward v Conrail*, 472 Mich 77, 83-84; 693 NW 2d 366 (2005) (citations omitted)].

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[4] Defendant's jurisdictional statement asserts that the trial court's order denying defendant's motion for JNOV and/or a new trial was erroneous, but defendant's brief does not develop this argument or contain appropriate citation to authority. Because this Court will not search for authority to support a party's position, *Schadewald v Brule*, 225 Mich App 26, 34; 570 NW2d 788 (1997), we consider this claim abandoned. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

III

The Supreme Court summarized premises liability law and the attendant duties of landowners to persons who sustain injuries on the owner's premises as follows:

> Historically, Michigan has recognized three common-law categories for persons who enter upon the land or premises of another: (1) trespasser, (2) licensee, or (3) invitee. Michigan has not abandoned these common-law classifications. Each of these categories corresponds to a different standard of care that is owed to those injured on the owner's premises. Thus, a landowner's duty to a visitor depends on that visitor's status.
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> Under *Stitt*, [the defendant's] duty, as a landowner, turns on [the plaintiff's] status at the time of the injuries. Once the plaintiff's status as a trespasser, licensee, or invitee is established, the next questions are whether [the defendant] breached the attendant duty and whether any such breach proximately caused the injuries at issue. [*James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001) (citations omitted).]

Defendant first argues that it did not "invite" or consent to plaintiff's presence on the premises, and that accordingly the trial court erred in determining that plaintiff was not a trespasser. We disagree. A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by "wilful and wanton" misconduct. *James, supra* at 19.

Here, defendant's consent or "[p]ermission may be implied where the owner acquiesces in the known, customary use of property by the public." *Alvin v* Simpson, 195 Mich App 418, 420; 491 NW2d 604 (1992), citing *Thone v Nicholson*, 84 Mich App 538, 544; 269 NW2d 665 (1978).

The substantial record evidence demonstrates defendant clearly acquiesced in distributing and accepting employment applications on its premises. Defendant greeted and assisted plaintiff upon his arrival. Notably, the owner, Mr. Nikolic, who was present when plaintiff arrived, did not turn plaintiff away and responded positively to plaintiff's inquiry as to whether defendant was accepting employment applications. Defendant's secretary testified that it was her practice, after providing a clipboard and application, to inform applicants, including plaintiff, they could remain and complete the application on-site. This evidence taken together with Martha Nikolic's characterization of plaintiff as a "gentleman visitor" belies a claim that defendant did not consent to plaintiff's presence on the premises. Thus, to the extent that defendant argues that plaintiff did not enter the premises by an express invitation, the proper focus is not whether plaintiff lacked consent to enter but whether at the time of his injury, he had consent to be on the premises. A landowner's duty turns on the plaintiff status at the time of his injuries. *James, supra* at 20. The trial court correctly found that as a matter of law, plaintiff was not a trespasser.

Defendant next contends that the trial court erred by submitting the question of whether plaintiff was a licensee or invitee to the trier of fact. We agree that the trial court erred in

submitting to the jury the question whether plaintiff was a licensee or an invitee, but find that the error was harmless.

The trial court initially determined that plaintiff was a licensee as a matter of law, but in ruling on plaintiff's motion for reconsideration the trial court reversed its initial determination and concluded that plaintiff's status on defendant's property was a fact issue for the jury. We find that the trial court's initial ruling was correct; on the record before us, plaintiff was a licensee as a matter of law. A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. *James, supra* at 19. Defendant's consent or "[p]ermission may be implied where the owner acquiesces in the known, customary use of property by the public," *Alvin, supra* at 195. The record unquestionably established that defendant acquiesced in the practice of walk-ins such as plaintiff entering the premises for purposes of receiving and completing employment applications. Thus, there is no material dispute of fact on plaintiff' status.

Because plaintiff was a licensee as a matter of law, the trial court erred in determining that there were issues of material fact as to whether plaintiff was an invitee. Generally, an "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *James, supra* at 19-20. In *Stitt, supra*, the Supreme Court clarified that "a business purpose or a business or *commercial benefit to the landowner* is a necessary requirement in order for a visitor to be deemed an invitee." *Stitt, supra* at 605, quoting *McNulty v Hurley*, 97 So 2d 185 (Fla, 1957) (emphasis added).[5]

Plaintiff's presence on defendant's property fails to satisfy the commercial purposes test. Defendant is a manufacturing facility not engaged in retail sales to the public. Plaintiff presented no evidence that defendant solicited persons to enter the premises for a commercial benefit. Even assuming defendant received some residual commercial benefit by accepting walk-in employment applications, the uncontradicted evidence was that defendant accepted walk-in employment applications solely on the advice of its attorney to do so to protect against the filing of claims of employment discrimination. Plaintiff provides no authority for the proposition that attempted compliance with state and federal employment laws constitutes a commercial purpose such that plaintiff should be considered an invitee. Because the acceptance of entirely unsolicited employment applications was not for an essential commercial purpose, the trial court erred in concluding that a question of material fact remained pertaining to plaintiff's status as invitee. Plaintiff neither demonstrated a direct tie to defendant's commercial business interests nor any tangible economic benefit to show "the prospect of pecuniary gain [to defendant as] a sort of quid pro quo for the higher duty of care owed to invitees" to warrant "the imposition of additional expense and effort by the landowner." *Stitt, supra* at 603-604.

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[5] In doing so, the Supreme Court eliminated consideration of the public invitee classification as stated in § 332 of the Restatement. *Stitt, supra* at 603.

Although the trial court erred by failing to conclude that plaintiff was a licensee as a matter of law, the matter properly proceeded to trial because an issue of fact remained as to the proximate cause of plaintiff's injuries. Thus, the jury properly heard the evidence pertaining to plaintiff's status as a licensee, and the submission of the question of plaintiff's status to the jury for determination was an error that caused no prejudice to defendant. MRE 103(a). Similarly, because plaintiff was a licensee the trial court properly denied defendant's motion for summary disposition seeking a determination that plaintiff was a trespasser as a matter of law.

Defendant next argues that because the trial court improperly determined that plaintiff's status should be submitted to the jury, the trial court improperly read SJI2d 19.01 and 19.03 to the jury. Defendant also contends that the modified version of SJI2nd 19.06 which the trial court read to the jury was confusing, and that the trial court erred by failing to read SJI2d 19.08 to the jury. We find no error requiring reversal.

Given plaintiff's licensee status, the trial court properly read SJI2d 19.06 to the jury. Although defendant challenges the modified version of SJI2d 19.06 read by the trial court, the instruction was not misleading or confusing to the jury. Generally, "[w]hen the standard jury instructions do not adequately cover an area, the trial court is obligated to give additional instructions when requested, if the supplemental instructions properly inform the jury of the applicable law and are supported by the evidence." *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401-402; 628 NW2d 86 (2001); see also MCR 2.516(D)(3)-(4). Additional instructions must be patterned in the style of the model instructions in a concise, understandable, conversational, unslanted, and nonargumentative manner. *Id*., citing MCR 2.516(D)(4).

Here, the trial court's instruction provided:

> A possessor of a place of business is liable for physical harm caused to a licensee by a condition on the place of business if, but only if—
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> a. the possessor knew or should have know of the condition and should have realized that it involved an unreasonable risk of harm to the licensee, and should have expected that he would not discover or realize the danger; and
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> b. the possessor failed to warn the licensee of the condition and the risk involved; and
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> c. the licensee did not know or have reason to know of the condition and the risk involved.
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> Plaintiff is expected to take the premises as defendant itself uses them and cannot expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety, in any manner in which the defendant does not prepare or take cautions for its own safety or that of its employees. The defendant owes the plaintiff a duty only to warn the plaintiff of hidden dangers the owners or has reason to know of, if the plaintiff does not know or have reason to know of the dangers involved.

We find no inherent error in the trial court's modified instruction as it accurately reflected the law pertaining to a possessor of land's duty to a licensee and was supported by the evidence. See *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 64-65, (2004) citing *Preston v Sleziak*, 383 Mich 442, 453; 175 NW2d 759, overruled on other grounds 383 Mich 482 (1970), quoting 2 Restatement Torts (2d), § 342, p 210. The trial court also properly declined to read SJI2d 19.08, since plaintiff was a licensee as a matter of law and not a trespasser. However, precisely because plaintiff was a licensee as a matter of law, the trial court erred in reading SJI 2d 19.01 and 19.03 to the jury. Despite this error, because the record supports a verdict finding defendant to be liable to plaintiff in his capacity as a licensee, we conclude that reversal is not warranted as defendant has not shown that the instructional error 'resulted in such unfair prejudice . . . that the failure to vacate the jury verdict would be '"inconsistent with substantial justice,"' MCR 2.613(A); *Ward*, *supra* at 83-84.

With regard to defendant's claim that reversal is warranted because the verdict form does not identify whether the jury determined plaintiff's status to be that of an invitee or that of a licensee, defendant waived the issue because it neither requested a special verdict form nor objected to the contents of the verdict form as submitted to the jury. A defendant may not harbor error as an appellate parachute. *In re Gazella*, 264 Mich App 668, 676-677; 692 NW2d 708 (2005). See also, *Dedes v Asch*, 233 Mich App 329, 334-335; 590 N W2d 605 (1998), rev'd on other grounds 469 Mich 487 (2003), (the defendant waived the issue by failing to object to the verdict form and by failing to request an instruction apportioning fault). See also *Zdrojewski v Murray*, 254 Mich App 50; 657 NW2d 721(2002) (despite the defendant's failure to request a special verdict form delineating between the three theories of liability presented, reversal was unwarranted as there was sufficient evidence to find the defendant negligence).

Finally, defendant argues that the trial court erred when it read SJI2d 19.10 (non-delegable duty instruction) to the jury. Defendant contends the instruction was prejudicial, notwithstanding the jury's apportionment of fault, because the instruction cast defendant in a bad light as it effectively told the jury that defendant's exercise of its right to apportion fault was an attempt by defendant to delegate duties it owed to plaintiff. We disagree.

The evidence supported the giving of the instruction. At trial, defendant continuously referred to Domestic's obligation to deliver and inspect the floor mats. Moreover, defendant's argument is flawed because it reads a contradiction between well-established premises liability principles, MCL 600.2957-- the statute allowing for non-party fault, and SJI2d 19.10, where none exists. As explained in *Smiley v Corrigan*, 248 Mich App 51, 57; 638 NW2d 151 (2001), a defendant is free to argue non-party fault. "[T]he very nature of litigation imposes the burden on the plaintiff to prove that the primary fault rests with the defendant at trial, and it is the defendant's strategic burden to argue and prove that the fault rests elsewhere." *Id*. Contrary to defendant's claims, MCL 600.2957 does not provide defendant with the opportunity to absolve itself from liability on the basis of non-party fault. "[A]ssessments of percentages of fault for non-parties are used only to *accurately determine the fault of named parties*." *Smiley*, *supra* at 56 (emphasis added).

Further, any danger of confusion by reading SJI2d 19.10 was removed because the trial court read defendant's special jury instruction defining fault as applied to Domestic:

> Nonparty fault can not be based upon a theory of premises liability in this case because the identified nonparty was not in possession and control of Nikolic Industries' palace of business. However, non-party fault can be based upon another theory of liability such as ordinary negligence.

Consistent with the special instruction and defendant's theory at trial that Domestic breached its common law duty to plaintiff to provide ordinary care, the jury did indeed find Domestic 50% at fault. The jury's determination demonstrates that it was neither misled nor confused by the reading of SJI2d 19.10. Defendant has not established prejudicial error.

On cross-appeal, plaintiff asserts defendant was barred from arguing Domestic's fault because Domestic owed no duty to him. We disagree.

Under MCL 600.2957(1), "the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action." See also MCR 2.112(K); MCL 600.2956; *Smiley*, *supra* at 53. MCL 600.6304(1)(b) and (4) further provide that in personal injury actions involving the fault of more than one person, the trier of fact must specifically determine the plaintiff's total damages and the percentage of fault attributed to all persons involved, "regardless of whether the person was or could have been named as a party to the action."

Plaintiff correctly asserts that under general premises liability law, Domestic owed no duty to him because it did not have possession and control of the premises. *Derbabian v Mariner's Pointe*, 249 Mich App 695, 702; 644 NW2d 779 (2002) (to be liable under a premises liability theory, plaintiff must show that defendant was a possessor of the premises at the time of plaintiff's injury).

However, under ordinary negligence principles, Domestic potentially owed a duty to plaintiff:

> Generally, those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. Duty of care not only arises out of a contractual relationship, but it also arises by operation of law, a general duty owed by defendant to the public of which plaintiff is a part. Under this theory, a breach of a contractual duty causes injury to a third party, who is then allowed to bring a tort action. [*Joyce v Rubin*, 249 Mich App 231, 243-244; 642 NW 2d 360 (2002) (internal quotations and citations omitted).]

In this case, by supplying defendant with floor mats pursuant to contract, Domestic owed a duty to plaintiff as one who could be foreseeably injured by its failure to properly perform under the contract.[6] Further, as the trial court recognized, plaintiff originally brought a claim

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[6] We note that plaintiff does not cite to any provision in the written agreement between defendant and Domestic that forecloses the argument that Domestic may have owed a duty to plaintiff. See e.g., *Koenig v South Haven*, 460 Mich 667, 676-680; 597 NW2d 99 (1999).

against Domestic and but for the settlement, Domestic would have been a party to the action. As a consequence, plaintiff's reliance on *Jones v Enertel, Inc*, 254 Mich App 432; 656 NW2d 870 (2002) is misplaced. In that case, this Court held that the defendant could not argue non-party fault against a contractor in a slip and fall case where the contractor was found not liable due to the application of the open and obvious doctrine. *Id.* at 436-438. "[A] party adjudicated to be without fault may not have fault allocated to him under the guise of the doctrine of several liability." *Jones, supra* at 437.

Here, Domestic was not "adjudicated to be without fault" but rather, voluntarily dismissed. Because liability was not adjudicated against Domestic, the factfinder was therefore obligated under MCL 600.2957 and MCL 600.6304 to apportion damages among all tortfeasors, "regardless of whether the person was or could have been named as a party to the action." The trial court properly denied plaintiff's motion for summary disposition.

Affirmed.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder